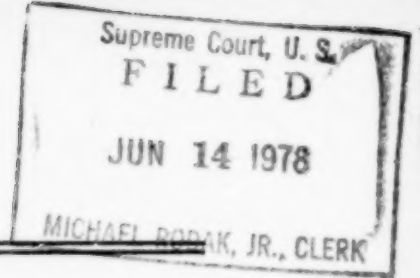


APPENDIX



IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and
HERBERT N. SOMEKH,

Petitioners,

against

LEO M. SHORE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI FILED MARCH 17, 1978
CERTIORARI GRANTED MAY 1, 1978

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Relevant Docket Entries**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

LEO M. SHORE,
Plaintiff-Appellant,
—against—

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH,
Defendants-Appellees.

<u>Date</u>	<u>Proceedings</u>
March 17, 1977	Filed petition for permission to appeal.
April 5, 1977	Filed order granting petition for leave to appeal.
September 12, 1977	Argument heard (By: Mansfield, Timbers, CJJ, Dooling, DJ).
November 1, 1977	Judgment reversed and remanded, Mansfield, CJ.
November 1, 1977	Filed judgment.
November 14, 1977	Filed petition for rehearing and rehearing in banc, appellees.
December 20, 1977	Filed order denying petition for rehearing.
December 20, 1977	Filed order denying petition for rehearing in banc.
December 27, 1977	Issued mandate.

Relevant Docket Entries

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

<u>Date</u>	<u>Proceedings</u>
November 13, 1974	Filed complaint and issued summons.
March 21, 1975	Filed Pltffs Affdvt in support of Class Action Determination.
April 22, 1975	Filed Pltffs Notice of Motion for Class Determination, ret. 5/2/75.
April 30, 1975	Filed Affidavit in opposition to motion for Class Action Determination by Steven A. Sanders.
May 5, 1975	Filed Memo. End. on affidavit dtd. 3/21/75. Motion granted without opposition. Settle Order on Notice. Wyatt, J.
June 23, 1975	Filed Defts' ANSWER.
July 14, 1975	Filed Order that the notice annexed to this Order is the best notice practicable under the circumstances & shall be mailed by the pltff within 60 days of the date hereof, to all of the Class Members. Carter J.
May 24, 1976	Filed Pltffs Affidavit & Notice of Motion for an order granting pltff leave to file an amended complaint. etc, rtble before Wyatt, J. on 6-4-76.

Relevant Docket Entries

<u>Date</u>	<u>Proceedings</u>
September 7, 1976	Filed memo endorsed on motion filed 5-24-76. The within motion is granted as indicated. Wyatt, J.
October 5, 1976	Filed Pltffs amended class action complaint. Pltff request trial by jury.
November 15, 1976	Filed ANSWER of defts Parklane Hosiery Co. Inc. Charles B. Yaffe, D.N. David and Neil B. Persky to the amended complaint.
November 15, 1976	Filed Answer of debt H.N. Somekh, D.D. Somekh and H.N. Somekh, to the amended complaint.
November 24, 1976	Filed Pltffs Affidvit & Notice of Motion for an order granting summary judgment to pltff etc, rtble on 12-17-76.
January 17, 1977	Filed Memo. End. on motion 11-24-76. Motion Denied. Wyatt J.
January 24, 1977	Filed Pltffs. Notice of Motion to Amend Interlocutory Order. Ret. 2/4/77.
February 14, 1977	Filed Memo-End on Pltffs. motion filed on 1-24-77. The within motion is granted. Settle Order. So Ordered. WYATT, J.
March 7, 1977	Filed order that the order denying pltffs motion for summary judgment, ent. 1-14-77 is hereby amended. SO ORDERED. PIERCE, J.

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLAINTIFF REQUESTS

TRIAL BY JURY

Plaintiff, by its attorneys, Kass, Goodkind, Wechsler & Gerstein, complaining of the defendants, alleges upon information and belief, except as to paragraphs 2(f) and 3, which are alleged upon knowledge:

JURISDICTION

1. Counts I and II of this Complaint are brought under Section 27 of the Securities Exchange Act of 1934 (the "34 Act") to enforce liabilities created by Sections 10(b) and 14(a) of the 34 Act, by Rules 10b-5, and 14a-9 promulgated thereunder, and by Section 20(a). Count III is brought under the principles of pendent jurisdiction to enforce liabilities created by common law.

CLASS ACTION ALLEGATIONS

2. This action is properly maintainable as a class action under the provisions of FRCP Rule 23(b)3.

(a) The class consists of all shareholders of defendant Parklane Hosiery Company, Inc. ("Parklane"), other than defendants, from June 15, 1973 to September 14, 1974, the record date specified in

Complaint

the Proxy Statement dated September 24, 1974 (the "Proxy Statement") issued in connection with the merger (the "Merger") between New PLHC Corp. ("New Corp.") with and into Parklane.

(b) On information and belief, there were several thousand persons who were beneficial owners of the common stock of Parklane during the class period.

(c) The members of the class are scattered throughout the United States and are so numerous as to make it impractical to bring them all before the Court.

(d) There are common questions of law and fact involved in this action: for example, whether defendants have engaged in schemes and artifices to defraud the members of the class while eliminating them as shareholders of Parklane by merging New Corp. into Parklane at terms grossly unfair to the members of the class; whether in furtherance of such scheme, defendants have undervalued Parklane stock for the purpose of benefiting defendants at the expense and to the damage of the class members; whether the Proxy Statement contains material misstatements and omits to state facts necessary to make the statements made not misleading; and whether the defendants thereby violated Sections 10(b) and 14 of the 34 Act and their fiduciary duties under the common law. Other common questions of law and fact are described more fully later in the complaint.

(e) Plaintiff's claims are typical of the class in that all members of the class will be damaged by

Complaint

the fraudulent and unfair merger in the same manner and in the same amount per share of Parklane held.

(f) Plaintiff will fairly and adequately protect the interest of the class. Plaintiff has retained attorneys who are thoroughly experienced with securities litigation. In this connection, the attorneys for the class are "av" rated by Martindale-Hubbell Law Directory, and have extensive experience in stockholders' class actions.

(g) The class action is superior to any other method available for a fair and efficient adjudication of the controversy since it would be impractical and undesirable for each of the members of the class who may suffer damages, in light of their relatively small claims, to bring separate actions in various parts of the country. A class action based on a fraudulent and unfair merger is a proper use of the class action device and no unusual difficulties are likely to be encountered in the management of this class action.

THE PARTIES

3. Plaintiff, an individual residing at 84-37 Avon Street, Jamaica, New York owns and has owned at all relevant times, 4,300 shares of Parklane.

4. Defendant Parklane is a corporation organized under the laws of the State of New York with its principal place of business in the State of New York. Its common stock was publicly traded until the time of the Merger.

Complaint

5. Defendants Herbert N. Somekh, Charles B. Yaffe, David N. David and Neil B. Persky (the "Directors") constituted at all times relevant to the wrongs alleged, the majority of the Board of Directors of Parklane and three out of the five directors of Parklane constituted at all times relevant to the wrongs alleged all of the Board of Directors of New Corp., a New York corporation which went out of existence upon the merger. At all times relevant to the wrongs alleged the defendants controlled both corporations.

6. Defendants Herbert N. Somekh, his wife, defendant Denise D. Somekh, Herbert Somekh as trustee of trusts for the benefit of his children, Charles Yaffe, his wife, Beulah Yaffe, Carl Appel, his wife, Esther Appel, and their children, Lawrence Appel and Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone are and were at the time alleged herein controlling shareholders of Parklane and New Corp.

COUNT I

7. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6.

8. This count is brought to enforce rights arising out of Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder, and Section 20(a) of the 34 Act.

9. In December, 1968 Parklane made its first public offering of its common stock at a price of \$9.00 per share. As a result, the book value of the common stock of Parklane owned by the defendants at the time was increased from \$1.54 to \$3.39.

Complaint

10. Between July, 1969 up to the present, the market value of Parklane has declined while overall during the period of time the financial structure of Parklane, in terms of cash per share, assets per share, book value per share, shareholders' equity and other relevant factors, has significantly improved.

11. During 1973, in the light of the significantly improved financial status of Parklane and the low market value of the Parklane stock, the Directors and controlling shareholders saw the opportunity to gain for themselves a higher proportional equity participation in Parklane at a cheap price and to "freeze out" the public minority shareholders.

12. Defendants then embarked on a conspiracy, device and scheme to acquire sole control of Parklane at a price which would be highly advantageous to the defendants, but unfair and damaging to the shareholders of Parklane, other than the defendants.

13. In furtherance of this conspiracy, device and scheme, during the period June 5, 1973 to July 30, 1974 the Directors caused Parklane to purchase large blocks of stock of Parklane in an aggregate of 121,054 shares of common stock at prices varying from a low of \$1.00 to a high of \$3.38, and at an average price of \$2.46 per share.

14. The purpose of such purchases, undisclosed to the members of the class, was to give defendants increased voting control over Parklane, and thereby facilitate their scheme to "freeze out" all public shareholders of Parklane.

15. In 1974, in furtherance of this conspiracy, device and scheme, the Directors incorporated New Corp. for the

Complaint

sole purpose of causing a merger of New Corp. with and into Parklane and under the relevant merger terms thereby "freeze out" the shareholders of Parklane, other than the defendants.

16. At the time of the incorporation of New Corp., the defendants caused 672,196 shares of common stock of Parklane representing 71.6% of the issued and outstanding stock of Parklane, to be transferred to New Corp. for an equivalent number of shares of New Corp. representing 100% of the issued and outstanding shares of New Corp.

17. Thereafter, the defendants caused three of the defendants to be elected to the Board of Directors of New Corp. Said three defendants constituted the entire Board of Directors of New Corp. and said three were at the same time three out of the five Directors constituting a majority of the Board of Directors of Parklane.

18. Other than the shares of Parklane, New Corp. had no assets or business purpose, but was formed solely for the purpose of "freezing out" the minority, the plaintiff class.

19. By virtue of New Corp.'s 71.6% interest in Parklane, by virtue of the substantially identical Board of Directors of the two corporations, the defendants herein had working and voting control of Parklane. Defendants used such control to cause New Corp. to merge with and into Parklane, as a result of which all of the issued and outstanding shares of Parklane issued to New Corp. were cancelled. Each share of New Corp. common stock, which was outstanding prior to the Merger and all of which was owned by the defendants, became one share of Parklane.

Complaint

The plaintiff class was paid \$2.00 per share cash from Parklane's assets in exchange for their shares of Parklane which were cancelled. The price of \$2.00 per share was far less than the real value of Parklane stock.

20. With respect to the \$2.00 merger price, the defendants have fraudulently represented to the members of the class that the price is fair and reasonable and represents the real value of Parklane stock.

21. The defendants knew that the \$2.00 price per share recommended by them was far less than the true value of the Parklane shares, but failed to disclose the same.

22. In furtherance of their conspiracy, device and scheme, the defendants caused the Proxy Statement to be distributed to the stockholders of Parklane for the sole purpose of complying with the federal and state statutory requirements with respect to holding a shareholders' meeting since the defendants themselves held the necessary votes to approve the Merger.

23. The Proxy Statement was no more than a transparent effort by the defendants to place the stamp of legality on their illicit scheme to eliminate the members of the class.

24. The Proxy Statement was, in itself, grossly misleading and fraudulent. The misstatements and omissions in the Proxy Statement are set forth in Count II of the complaint and such misstatements and omissions are included herein by reference.

25. In furtherance of the aforesaid scheme and conspiracy to defraud defendants have intentionally made

Complaint

their illegal take-over during the height of the "bear market" at a time when Parklane stock was selling far below past market prices.

26. Defendants thereby have "frozen out" the members of the class, all of the public minority stockholders, who have held their Parklane stock through difficult times and, thereby, the defendants acquired 100% control of Parklane at great advantage to themselves at the lowest possible price to themselves and at the highest possible expense and damage to the members of the class.

27. Defendants have intentionally and fraudulently failed to disclose the aforesaid device, scheme and conspiracy and all of the elements thereof to the members of the class, to their great damage.

28. In carrying out the foregoing fraudulent device, conspiracy and scheme, defendants have acted both singly and in concert, and are continuing to so act, to eliminate the shareholders of Parklane other than New Corp. by merging New Corp. into Parklane at grossly unfair terms. To achieve this plan, they conspired, jointly and severally, to defraud, deceive and mislead the shareholders of Parklane other than the defendants. Defendants' acts were carried out by use of the instrumentalities of interstate commerce and the mails.

29. By reason of the foregoing, defendants have violated Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder and Section 20(a) of the 34 Act.

Complaint

COUNT II

30. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6 and 8 through 29.

31. Defendants caused Parklane to distribute by use of the mails and the means and instrumentalities of interstate commerce the Proxy Statement.

32. The Proxy Statement contained material misstatements and omitted to state material facts necessary in order to make the statements therein not false and misleading. The Proxy Statement was materially false and misleading in all of the following respects:

(a) In stating that the price of \$2.00 per share was fair to Parklane's shareholders other than the defendants.

(b) In failing to include in the Proxy Statement copies of opinions of Thomson & McKinnon Auchinloss, Kohlmeyer Inc. and Foster Securities Corporation, referred to in the Proxy Statement, as to the proposed price being offered to the shareholders in the Merger.

(c) In failing to properly disclose Parklane's present financial condition.

(d) In failing to disclose that, as a result of the Merger, the defendants' share in the assets, earnings, earnings capacity, cash flow and book value of Parklane would be vastly increased.

(e) In failing to disclose that the Merger was not necessary in order to avoid certain of the expenses of being a publicly held corporation, such as the

Complaint

expense of a transfer agent and such as the expense of being listed on the American Stock Exchange.

(f) In failing to disclose at the time of the Proxy Statement that there had been an offer of approximately \$1,100,000 for a leaseholding owned by Parklane.

(g) In failing to disclose any of the terms of the fraudulent scheme described in Count I herein, or even the very existence of the scheme to defraud the members of the class.

33. By reason of the foregoing, the defendants violated the provisions of Section 14(a) of the 34 Act and Rule 14a-9 promulgated thereunder, to the damage of the plaintiff and the members of the class.

COUNT III

34. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6, 8 through 29 and 30 through 33.

35. The aforesaid conspiracy, device, scheme and artifice to defraud on the part of the Parklane Directors and other defendants, and the acts and practices in the course of business carried on by them, as above described, constituted and continues to constitute (a) a breach of the fiduciary duty owed by each of them as directors and controlling shareholders to the minority shareholders of Parklane; (b) a breach of the duty of loyalty and good faith owed by each of them to the minority shareholders of Parklane in managing the affairs of Parklane; and (c) a breach of the

Complaint

duty owed by each of them to the minority shareholders of Parklane to act on decisions with respect to the business, properties and affairs of Parklane for the benefit of all of the shareholders of Parklane and not for the benefit of themselves.

36. As a result of the breaches of duty hereinbefore described, the shareholders of Parklane other than the defendants have suffered damages.

WHEREFORE, plaintiff prays for the following relief:

(a) That the plaintiff and the members of the class be awarded damages for their losses and defendants' profits;

(b) That the plaintiff and the members of the class be awarded punitive damages for the willful and outrageous conduct of the defendants;

(c) That plaintiff be awarded the cost and disbursements of this action, including reasonable attorneys' and experts' fees to be paid by the defendants; and

(d) That the plaintiff and the members of the class have such other and further relief as to the Court is just and equitable.

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

Answer

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendants, Parklane Hosiery Company, Inc., Herbert N. Somekh, Denise D. Somekh, Herbert N. Somekh, as Trustee, Charles B. Yaffe, Beulah Yaffe, David N. David, Neil B. Persky and Arthur Gold, by their attorneys, Jacobs Persinger & Parker, for their answer to the complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the complaint.

SECOND: Deny each and every allegation contained in the first paragraph of paragraph "2" of the complaint, except admit that plaintiff purports to bring this action under the provisions of F.R.C.P. 23(b)(3).

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof.

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs "(b)" and "(c)" of paragraph "2" of the complaint.

FIFTH: Deny each and every allegation contained in subparagraphs "(d)", "(e)" and "(g)" of paragraph "2" of the complaint.

Answer

SIXTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the complaint.

EIGHTH: Deny each and every allegation contained in paragraph "5" of the complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

NINTH: Deny each and every allegation contained in paragraph "6" of the complaint.

AS TO THE ALLEGED COUNT I

TENTH: With respect to paragraph "7" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" of the complaint as though the same were here set forth at length.

ELEVENTH: Deny each and every allegation contained in paragraph "8" of the complaint.

TWELFTH: Deny each and every allegation contained in paragraph "9" of the complaint, except admit that in December, 1968, Parklane sold to the public 300,000 shares of its common stock at a price of \$9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon

Answer

Parklane's shareholders' equity at June 29, 1968) from \$1.54 to \$3.39 per share.

THIRTEENTH: Deny each and every allegation contained in paragraph "10" of the complaint, except admit that in or about July, 1969 the market price of Parklane common stock as reported by the American Stock Exchange was higher than the market price of such stock on or about October 15, 1974 as reported by the American Stock Exchange.

FOURTEENTH: Deny each and every allegation contained in paragraphs "11", "12", "13", "14" and "15" of the complaint.

FIFTEENTH: Deny each and every allegation contained in paragraph "16" of the complaint, except admit that at or about the time New PLHC Corp. was organized it acquired 672,196 shares of common stock of Parklane, that said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued, and was 100% of its outstanding stock.

SIXTEENTH: Deny each and every allegation contained in paragraph "17" of the complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors constituting a majority of the Board of Directors of Parklane.

Answer

SEVENTEENTH: Deny each and every allegation contained in paragraph "18" of the complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "19" of the complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

NINETEENTH: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27", "28" and "29" of the complaint.

AS TO THE ALLEGED COUNT II

TWENTIETH: With respect to paragraph "30" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" and "8" through "29" of the complaint as though the same were here set forth at length.

TWENTY-FIRST: Deny each and every allegation contained in paragraph "31" of the complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-SECOND: Deny each and every allegation contained in paragraph "32" of the complaint and in each subparagraph thereof.

TWENTY-THIRD: Deny each and every allegation contained in paragraph "33" of the complaint.

Answer

S TO THE ALLEGED COUNT III

TWENTY-FOURTH: With respect to paragraph "34" of the complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "29" and "30" through "33" of the complaint as though the same were here set forth at length.

TWENTY-FIFTH: Deny each and every allegation contained in paragraphs "35" and "36" of the complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

TWENTY-SIXTH: The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

TWENTY-SEVENTH: Plaintiff's exclusive remedy for the payment of the fair value of his shares is governed by Section 623 of the New York Business Corporation Law.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

TWENTY-EIGHTH: On or about January 17, 1975, plaintiff commenced an appraisal proceeding entitled *In the Matter of the Petition of Leo M. Shore, etc.*, Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

WHEREFORE, defendants demand judgment dismissing the complaint as against them, together with the costs and disbursements of this action.

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

**Order of the District Court Approving
Form of Notice to Class**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

against

PARKLANE HOSIERY COMPANY, INC., *et al.*,

Defendants.

This Court, by order dated May 2, 1975 having determined that this action be maintained as a class action on behalf of all shareholders of Parklane Hosiery Company, Inc. ("Parklane") on September 14, 1974 (the "Class Members"); and the Court having ordered that notice of said class action determination, in form satisfactory to this Court, be mailed to all of the Class Members it is, hereby,

ORDERED, that the notice annexed to this Order is the best notice practicable under the circumstances and shall be mailed by the plaintiff in this action, within 60 days of the date hereof, to all of the Class Members.

Dated: New York, New York
July 9th, 1975

ROBERT L. CARTER
U.S.D.J.

*Order of the District Court Approving
Form of Notice to Class*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

NOTICE TO CERTAIN FORMER SHAREHOLDERS
OF PARKLANE HOSIERY COMPANY, INC.

The above-entitled action has been brought as a class suit. The complaint alleges that the defendants violated certain anti-fraud provisions of the Securities Exchange Act of 1934 and principles of common law in connection with the merger of Parklane Hosiery Company, Inc. ("Parklane") and New PLHC Corp. ("New Corp."), as a result of which the plaintiff and the class members (those owners of Parklane common stock on September 14, 1974, the record date in connection with the meeting at which the merger was voted on) sustained losses. The defendants are Parklane, and certain directors and allegedly controlling shareholders of Parklane, i.e., Herbert N. Somekh, Denise D. Somekh, Herbert N. Somekh, as Trustee of trusts for the benefit of his children, Charles B. Yaffe, Beulah Yaffe, David N. David, Neil B. Persky, Carl Appel, Esther Appel, Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone. Not all of the defendants have appeared in the action. The complaint seeks money damages for the members of the class.

The defendants appearing in this action deny any wrongdoing and plead various defenses. No court has yet passed upon the merits of the claims.

The Court has determined that this action is maintainable as a class action under the Federal Rules of Civil Pro-

*Order of the District Court Approving
Form of Notice to Class*

cedure and has directed that notice be given to the members of the class. The mailing of this notice is not to be construed in any way as an expression of any opinion by the Court as to the merits, but this notice is merely to advise of the pendency of this action and of certain rights former shareholders of Parklane may have with respect to this action.

THE PURPOSE OF THIS NOTICE is to ascertain whether you want to be included in the class of shareholders on whose behalf this action has been brought. You will be considered a member of such class unless you request that you be excluded. All members of the class who do not request exclusion (in the manner stated below) will receive the benefit of a favorable decision in the action and will be bound by an adverse judgment. Under no circumstances will you be required to contribute to the expenses involved in prosecuting this action. If there is a recovery, the Court will be asked to authorize payment of the litigation expenses and reasonable fees to plaintiff's attorneys and experts, to be deducted from the amount of the recovery. In case of recovery, you will be required to prove your membership in the class and your individual damage.

The attorneys representing the class are Kass, Goodkind, Wechsler & Gerstein, 122 East 42nd Street, New York, New York 10017.

You need not do anything if you want to be included in the class. If you desire to be excluded from the class, you should write a letter or postcard to the attorneys for the class at the above-listed address requesting exclusion. Please refer to *Shore v. Parklane Hosiery Company, Inc.*, 74 Civ. 4986, state your name and address, and also state the number of shares of Parklane which you owned on Sep-

*Order of the District Court Approving
Form of Notice to Class*

tember 14, 1974. Your written request for exclusion must be received by September 30, 1975. If you do not request exclusion, you have the right to enter an appearance herein through your own counsel.

Dated: New York, New York
September 8, 1975

RAYMOND F. BURGHARDT
Clerk for the UNITED STATES
DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK

Notice of Motion to Amend the Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Stuart D. Wechsler, sworn to May 18, 1976, and the exhibit annexed thereto, plaintiff will move this Court at the United States District Courthouse, Foley Square, New York, New York, Courtroom 1506, at 2:30 p.m. on June 4, 1976, before Hon. Inzer B. Wyatt, for an order pursuant to FRCP Rule 15(a) granting plaintiff leave to file an amended complaint.

Dated: New York, New York
May 20, 1976

Yours, etc.

KASS, GOODKIND, WECHSLER & GERSTEIN

• • •

[PROOF OF SERVICE OMITTED IN PRINTING]

**Memorandum Endorsement of the District Court
Granting Motion to Amend the Complaint**

The within motion is granted without passing upon any of the merits or not of the claim for rescission. Any defense to that claim may be raised in any manner appropriate under applicable rules.

So Ordered.

/s/ INZER B. WYATT

USDJ

September 3, 1976

Amended Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

PLAINTIFF REQUESTS

TRIAL BY JURY

Plaintiff, by its attorneys, Kass, Goodkind, Wechsler & Gerstein, complaining of the defendants, alleges upon information and belief, except as to paragraphs 2(f) and 3, which are alleged upon knowledge:

JURISDICTION

1. Counts I, II and III of this Complaint are brought under Section 27 of the Securities Exchange Act of 1934 (the "34 Act") to enforce liabilities created by Sections 10(b), 13(a), 14(a) and 20(a) of the 34 Act, and the Rules and Regulations promulgated thereunder. Count IV is brought under the principles of pendent jurisdiction to enforce liabilities created by common law.

CLASS ACTION ALLEGATIONS

2. This action is properly maintainable as a class action under the provisions of FRCP Rule 23(b)3.

(a) The class consists of all shareholders of defendant Parklane Hosiery Company, Inc. ("Park-

Amended Complaint

lane"), other than defendants on September 14, 1974, the record date specified in the Proxy Statement dated September 24, 1974 (the "Proxy Statement") issued in connection with the merger (the "Merger") between New PLHC Corp. ("New Corp.") with and into Parklane.

(b) There were over seven hundred persons who were beneficial owners of the common stock of Parklane during the class period.

(c) The members of the class are scattered throughout the United States and are so numerous as to make it impractical to bring them all before the Court.

(d) There are common questions of law and fact involved in this action; for example, whether defendants have engaged in schemes and artifices to defraud the members of the class while eliminating them as shareholders of Parklane by merging New Corp. into Parklane at terms grossly unfair to the members of the class; whether in furtherance of such scheme, defendants have undervalued Parklane stock for the purpose of benefiting defendants at the expense and to the damage of the class members; whether the Proxy Statement contains material misstatements and omits to state facts necessary to make the statements made not misleading; and whether the defendants thereby violated Sections 10(b) and 14 of the 34 Act and their fiduciary duties under the common law. Other common questions of law and fact are described more fully later in the complaint.

Amended Complaint

(e) Plaintiff's claims are typical of the class in that all members of the class will be damaged by the fraudulent and unfair merger in the same manner and in the same amount per share of Parklane held.

(f) Plaintiff will fairly and adequately protect the interest of the class. Plaintiff has retained attorneys who are thoroughly experienced with securities litigation. In this connection, the attorneys for the class are "av" rated by Martindale-Hubbell Law Directory and have extensive experience in stockholders' class actions.

(g) The class action is superior to any other method available for a fair and efficient adjudication of the controversy since it would be impractical and undesirable for each of the members of the class who may suffer damages, in light of their relatively small claims, to bring separate actions in various parts of the country. A class action based on a fraudulent and unfair merger is a proper use of the class action device and no unusual difficulties are likely to be encountered in the management of this class action.

THE PARTIES

3. Plaintiff, an individual residing at 84-37 Avon Street, Jamaica, New York, owns and has owned at all relevant times, 4,300 shares of Parklane.

4. Defendant Parklane is a corporation organized under the laws of the State of New York with its principal place of business in the State of New York. Its common stock was publicly traded until the time of the Merger.

Amended Complaint

5. Defendants Herbert N. Somekh, Charles B. Yaffe, David N. David and Neil B. Persky (the "Directors") constituted at all times relevant to the wrongs alleged, the majority of the Board of Directors of Parklane and three out of the five directors of Parklane constituted at all times relevant to the wrongs alleged, all of the Board of Directors of New Corp., a New York corporation which went out of existence upon the merger. At all times relevant to the wrongs alleged the defendants controlled both corporations.

6. Defendants Herbert N. Somekh, his wife, defendant Denise D. Somekh, Herbert Somekh as trustee of trusts for the benefit of his children, Charles Yaffe, his wife, Beulah Yaffe, Carl Appel, his wife, Esther Appel, and their children, Lawrence Appel and Florence Mukamel, Arthur Gold, Stanley Kuschner and Harold Stone are and were at the time alleged herein controlling shareholders of Parklane and New Corp.

COUNT I

7. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6.

8. This count is brought to enforce rights arising out of Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder, and Section 20(a) of the 34 Act.

9. In December, 1968 Parklane made its first public offering of its common stock at a price of \$9.00 per share. As a result, the book value of the common stock of Parklane owned by the defendants at the time was increased from \$1.54 to \$3.39.

Amended Complaint

10. As part of a scheme to defraud and a deceptive course of business, defendant Somekh caused Parklane to solicit its shareholders with false and misleading proxy materials for the purpose of converting Parklane to a privately-owned company as part of a plan conceived by Somekh to avail himself of Parklane's corporate assets in order to reduce his large personal indebtedness. In that connection defendant Somekh owned and controlled, directly or indirectly, a sufficient number of Parklane shares to determine the outcome of a shareholder vote in favor of converting Parklane to a privately-owned company. As part of this plan, public Parklane shareholders were to receive \$2.00 per share. In the proxy materials used and disseminated to Parklane shareholders, the defendants made and caused to be made untrue statements of material facts and omitted to state material facts, as more fully described below.

11. In or about 1971, defendant Somekh personally borrowed approximately \$900,000 from a bank, and thereafter, borrowed approximately \$300,000 from two other banks. In or about September, 1973, the lending banks became insistent that defendant Somekh commence to reduce these outstanding financial obligations.

12. In or about June 1973, in attempting to reduce his large personal indebtedness, defendant Somekh and the other directors embarked upon a plan which provided for the conversion of Parklane from a public to a privately-owned company, and thereafter, once Parklane became privately owned [and under Somekh's control] to cause Parklane to purchase Somekh's personal real estate holdings in exchange for cash and notes which Somekh, in turn, would utilize in reducing his personal indebtedness to the banks.

Amended Complaint

13. In furtherance of this conspiracy, device and scheme, during the period June 5, 1973 to July 30, 1974 the Directors caused Parklane to purchase large blocks of stock of Parklane in an aggregate of 121,054 shares of common stock at prices varying from a low of \$1.00 to a high of \$3.38, and at an average price of \$2.46 per share.

14. The purpose of such purchases, undisclosed to the members of the class, was to give defendants increased voting control over Parklane, and thereby facilitate their scheme to "freeze out" all public shareholders of Parklane.

15. In 1974, in furtherance of this conspiracy, device and scheme, the Directors incorporated New Corp. for the sole purpose of causing a merger of New Corp. with and into Parklane and under the relevant merger terms thereby "freeze out" the shareholders of Parklane, other than the defendants.

16. At the time of the incorporation of New Corp., the defendants caused 672,196 shares of common stock of Parklane representing 71.6% of the issued and outstanding stock of Parklane, to be transferred to New Corp. for an equivalent number of shares of New Corp., representing 100% of the issued and outstanding shares of New Corp.

17. Thereafter, the defendants caused three of the defendants to be elected to the Board of Directors of New Corp. Said three defendants constituted the entire Board of Directors of New Corp. and said three were at the same time three out of the five Directors constituting a majority of the Board of Directors of Parklane.

Amended Complaint

18. Other than the shares of Parklane, New Corp. had no assets or business purpose, but was formed solely for the purpose of "freezing out" the minority, the plaintiff class.

19. By virtue of New Corp.'s 71.6% interest in Parklane, and by virtue of the substantially identical Board of Directors of the two corporations, the defendants herein had working and voting control of Parklane. Defendants used such control to cause New Corp. to merge with and into Parklane, as a result of which all of the issued and outstanding shares of Parklane issued to New Corp. were cancelled. Each share of New Corp. common stock, which was outstanding prior to the Merger and all of which was owned by the defendants, became one share of Parklane. The plaintiff class was paid \$2.00 per share cash from Parklane's assets in exchange for their shares of Parklane which were cancelled. The price of \$2.00 per share was far less than the real value of Parklane stock.

20. With respect to the \$2.00 merger price, the defendants have fraudulently represented to the members of the class that the price is fair and reasonable and represents the real value of Parklane stock.

21. The defendants knew that the \$2.00 price per share recommended by them was far less than the true value of the Parklane shares, but failed to disclose the same.

22. In furtherance of their conspiracy, device and scheme, the defendants caused the Proxy Statement to be distributed to the stockholders of Parklane.

23. The Proxy Statement was no more than a transparent effort by the defendants to place the stamp of legality on their illicit scheme to eliminate the members of the class.

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24. The Proxy Statement was, in itself, grossly misleading and fraudulent. The misstatements and omissions in the Proxy Statement are set forth in Count II of the complaint and such misstatements and omissions are included herein by reference.

25. Defendants thereby have illegally "frozen out" the members of the class, all of the public minority stockholders, for the benefit of defendant Somekh who needed Parklane's assets in order to reduce his large personal indebtedness, to the damage of the members of the class.

26. Defendants have intentionally and fraudulently failed to disclose the aforesaid device, scheme and conspiracy and all of the elements thereof to the members of the class, to their great damage.

27. In carrying out the foregoing fraudulent device, conspiracy and scheme, defendants have acted both singly and in concert to eliminate the shareholders of Parklane other than New Corp. by merging New Corp. into Parklane at grossly unfair terms. To achieve this plan, they conspired, jointly and severally, to defraud, deceive and mislead the shareholders of Parklane other than the defendants. Defendants' acts were carried out by use of the instrumentalities of interstate commerce and the mails.

28. By reason of the foregoing, defendants have violated Section 10(b) of the 34 Act, Rule 10b-5 promulgated thereunder and Section 20(a) of the 34 Act.

COUNT II

29. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6 and 8 through 27.

Amended Complaint

30. Defendants caused Parklane to distribute by use of the mails and the means and instrumentalities of interstate commerce the Proxy Statement.

31. The Proxy Statement contained material misstatements and omitted to state material facts necessary in order to make the statements therein not false and misleading including, *inter alia*, the following:

(a) It made statements as to various reasons why Parklane would be converted to a privately-owned company, when in fact, the true undisclosed reason for Parklane's conversion in corporate status was that Somekh was using such device in aid of meeting his personal financial obligations when there was no valid corporate purpose for such conversion in Parklane's status;

(b) It made statements concerning the termination of negotiations with the Federal Reserve Bank of New York ("FRB") with regard to Parklane's leasing of property located in New York City from the FRB, when in fact, the defendants failed to disclose the existence of ongoing negotiations with the FRB concerning the cancellation of such leasehold rights which negotiations could have resulted in Parklane receiving substantial benefits;

(c) It made statements that Parklane had employed two appraisers to determine the fair value of Parklane stock, when in fact, the defendants failed to disclose in the proxy statement of Parklane that the two appraisers were not provided with sufficient information in order to prepare and provide a true and complete valuation of such stock.

Amended Complaint

(d) It stated that the price of \$2.00 per share was fair to Parklane's shareholders other than the defendants.

(e) It did not include copies of opinions of the two appraisers.

(f) It failed to properly disclose Parklane's present financial condition.

(g) It failed to disclose that the Merger was not necessary in order to avoid certain of the expenses of being a publicly held corporation, such as the expense of a transfer agent and such as the expense of being listed on the American Stock Exchange.

(h) It failed to disclose any of the terms of the fraudulent scheme described in Count I herein, or even the very existence of the scheme to defraud the members of the class.

32. By reason of the foregoing, the defendants violated the provisions of Section 14(a) of the 34 Act and Rule 14a-9 promulgated thereunder, to the damage of the plaintiff and the members of the class.

COUNT III

33. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6, 8 through 28 and 30 and 31.

34. On or about July 10, 1975, for the fiscal year ending September 28, 1974 defendant Parklane, aided and abetted by the individual defendants, filed or caused to be filed

Amended Complaint

its annual report with the Securities and Exchange Commission (the "Commission") on Form 10-K, pursuant to Section 13(a) of the Act, and Rule 13a-1 promulgated thereunder. Said Form 10-K report contained statements of material facts which were false and misleading as more fully described in Count I of this complaint and was thereby not in compliance with the aforementioned Commission rules and regulations promulgated pursuant to Section 13(a) of the Act.

35. For the fiscal year ending September 30, 1975, defendant Parklane, aided and abetted by the individual defendants, failed to file its annual report on Form 10-K pursuant to Section 13(a) of the Act and Rule 13a-1 promulgated thereunder, which Form 10-K report was due to be filed with the Commission on or about December 30, 1975.

36. On or about October 23, 1975, defendant Parklane, aided and abetted by the individual defendants filed or caused to be filed its quarterly reports with the Commission on Form 10-Q, pursuant to Section 13(a) of the Act and Rule 13a-13 promulgated thereunder for the calendar quarters ending December 31, 1974 through June 30, 1975. Said reports contained materially false and misleading statements as more fully alleged in Count I of this complaint and was thereby not in compliance with the aforementioned Commission rules and regulations promulgated pursuant to Section 13(a) of the Act.

COUNT IV

37. Plaintiff repeats and realleges the allegations contained in paragraphs 1 through 6, 8 through 28 and 30 and 31.

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38. The aforesaid conspiracy, device, scheme and artifice to defraud on the part of the Parklane Directors and other defendants, and the acts and practices in the course of business carried on by them, as above described, constituted and continues to constitute (a) a breach of the fiduciary duty owed by each of them as directors and controlling shareholders to the minority shareholders of Parklane; (b) a breach of the duty of loyalty and good faith owed by each of them to the minority shareholders of Parklane in managing the affairs of Parklane; and (c) a breach of duty owed by each of them to the minority shareholders of Parklane to act on decisions with respect to the business, properties and affairs of Parklane for the benefit of all of the shareholders and not for the benefit of themselves.

39. As a result of the breaches of duty hereinbefore described, the shareholders of Parklane other than the defendants have suffered damages.

WHEREFORE, plaintiff prays for the following relief:

(a) That the plaintiff and the members of the class be awarded damages for their losses and defendants' profits;

(b) That the plaintiff and the members of the class be awarded punitive damages for the willful and outrageous conduct of the defendants;

(c) That the Merger be rescinded, that corrective proxy materials be distributed to each member of the class and that Parklane be required to offer to each of the class members the return of his shares or, in the alternative, the cash equivalent of his shares

Amended Complaint

as of the date of the Merger less the \$2.00 already received for such shares;

(d) That plaintiff be awarded the cost and disbursements of this action, including reasonable attorneys' and experts' fees to be paid by the defendants; and

(e) That the plaintiff and the members of the class have such other and further relief as to the Court is just and equitable.

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

**Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendants, Parklane Hosiery Company, Inc. ("Parklane"), Charles B. Yaffe, David N. David and Neil B. Persky, by their attorneys, Jacobs Persinger & Parker, for their answer to the amended complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the amended complaint.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of paragraph "2" of the amended complaint.

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the amended complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof and refer to the ruling of the Court dated May 2, 1975 and the Order of the Court dated July 9, 1975.

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

subparagraphs "(b)" and "(c)" of paragraph "2" of the amended complaint.

FIFTH: With respect to subparagraph "(d)" of paragraph "2" of the amended complaint, deny that there is any proper or valid question of fact or law raised therein.

SIXTH: Deny each and every allegation contained in subparagraph "(e)" of paragraph "2" of the amended complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the amended complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(g)" of paragraph "2" of the amended complaint, except deny that there is any proper or valid basis for the claim of a fraudulent and unfair merger.

NINTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the amended complaint.

TENTH: Deny each and every allegation contained in paragraph "5" of the amended complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

ELEVENTH: Deny each and every allegation contained in paragraph "6" of the amended complaint.

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

AS TO THE ALLEGED COUNT I

TWELFTH: With respect to paragraph "7" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6" of the amended complaint as though the same were here set forth at length.

THIRTEENTH: Deny each and every allegation contained in paragraph "8" of the amended complaint.

FOURTEENTH: Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that in December 1968 Parklane sold to the public 300,000 shares of its common stock at a price of \$9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon Parklane's shareholders' equity at June 29, 1968) from \$1.54 to \$3.39 per share.

FIFTEENTH: Deny each and every allegation contained in paragraph "10" of the amended complaint.

SIXTEENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "11" of the amended complaint.

SEVENTEENTH: Deny each and every allegation contained in paragraphs "12", "13", "14" and "15" of the amended complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "16" of the amended complaint, except admit that at or about the time New PLHC Corp. was organized it acquired 672,196 shares of common stock

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

of Parklane, that said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued and was 100% of its outstanding stock.

NINETEENTH: Deny each and every allegation contained in paragraph "17" of the amended complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors of Parklane.

TWENTIETH: Deny each and every allegation contained in paragraph "18" of the amended complaint.

TWENTY-FIRST: Deny each and every allegation, contained in paragraph "19" of the amended complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

TWENTY-SECOND: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27" and "28" of the amended complaint.

AS TO THE ALLEGED COUNT II

TWENTY-THIRD: With respect to paragraph "29" of the amended complaint, repeat and reallege each and every alle-

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

gation made in answer to paragraphs "1" through "6" and "8" through "27" of the amended complaint as though the same were here set forth at length.

TWENTY-FOURTH: Deny each and every allegation contained in paragraph "30" of the amended complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-FIFTH: Deny each and every allegation contained in paragraph "31" of the amended complaint and in each subparagraph thereof.

TWENTY-SIXTH: Deny each and every allegation contained in paragraph "32" of the amended complaint.

AS TO THE ALLEGED COUNT III

TWENTY-SEVENTH: With respect to paragraph "33" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

TWENTY-EIGHTH: Deny each and every allegation contained in paragraph "34" of the amended complaint, except admit that the Parklane annual report on Form 10-K for the fiscal year ended September 28, 1974 was filed with the Securities and Exchange Commission on or about July 14, 1975.

TWENTY-NINTH: Deny each and every allegation contained in paragraph "35" of the amended complaint.

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Including Parklane Hosiery Company, Inc.*

THIRTIETH: Deny each and every allegation contained in paragraph "36" of the amended complaint, except admit that the Parklane quarterly reports on Form 10-Q for the fiscal quarters ended December 28, 1974, March 28, 1975 and June 27, 1975 were filed with the Securities and Exchange Commission on or about October 22, 1975.

AS TO THE ALLEGED COUNT IV

THIRTY-FIRST: With respect to paragraph "37" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

THIRTY-SECOND: Deny each and every allegation contained in paragraphs "38" and "39" of the amended complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

THIRTY-THIRD: The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

THIRTY-FOURTH: The exclusive remedy for the payment of the fair value of the shares of any purported members of the purported plaintiff class is governed by Section 623 of the New York Business Corporation Law.

*Answer to Amended Complaint of Certain Defendants
Including Parklane Hosiery Company, Inc.*

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

THIRTY-FIFTH: On or about January 17, 1975, plaintiff Leo M. Shore commenced an appraisal proceeding entitled *In the Matter of the Petition of Leo M. Shore, etc.*, Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

THIRTY-SIXTH: On or about January 23, 1975, certain purported members of the purported plaintiff class commenced an appraisal proceeding entitled *Pappalardo, et al. v. Parklane Hosiery Company, Inc.*, Index No. 1268/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

THIRTY-SEVENTH: The purported members of the purported plaintiff class are not entitled to rescission of the October 1974 merger of New PLHC Corp. into Parklane since they did not act promptly in asserting a demand for rescission.

WHEREFORE, defendants demand judgment dismissing the amended complaint as against them, together with the costs and disbursements of this action.

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[PROOF OF SERVICE OMITTED IN PRINTING]

**Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

Defendants, Herbert N. Somekh, Denise D. Somekh and Herbert N. Somekh, as Trustee, by their attorneys, Jacobs Persinger & Parker, for their answer to the amended complaint herein:

FIRST: Deny each and every allegation contained in paragraph "1" of the amended complaint.

SECOND: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first paragraph of paragraph "2" of the amended complaint.

THIRD: Deny each and every allegation contained in subparagraph "(a)" of paragraph "2" of the amended complaint, except admit that a proxy statement dated September 24, 1974 was issued in connection with the merger to which proxy statement reference is made for the terms thereof and refer to the ruling of the Court dated May 2, 1975 and the Order of the Court dated July 9, 1975.

FOURTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraphs "(b)" and "(c)" of paragraph "2" of the amended complaint.

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

FIFTH: With respect to subparagraph "(d)" of paragraph "2" of the amended complaint, deny that there is any proper or valid question of fact or law raised therein.

SIXTH: Deny each and every allegation contained in subparagraph "(e)" of paragraph "2" of the amended complaint.

SEVENTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(f)" of paragraph "2" of the amended complaint.

EIGHTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in subparagraph "(g)" of paragraph "2" of the amended complaint, except deny that there is any proper or valid basis for the claim of a fraudulent and unfair merger.

NINTH: Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "3" of the amended complaint.

TENTH: Deny each and every allegation contained in paragraph "5" of the amended complaint, except admit that New PLHC Corp., a New York corporation, was merged into Parklane.

ELEVENTH: Deny each and every allegation contained in paragraph "6" of the amended complaint.

AS TO THE ALLEGED COUNT I

TWELFTH: With respect to paragraph "7" of the amended complaint, repeat and reallege each and every

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

allegation made in answer to paragraphs "1" through "6" of the amended complaint as though the same were here set forth at length.

THIRTEENTH: Deny each and every allegation contained in paragraph "8" of the amended complaint.

FOURTEENTH: Deny each and every allegation contained in paragraph "9" of the amended complaint, except admit that in December 1968, Parklane sold to the public 300,000 shares of its common stock at a price of \$9 per share, and that the book value of shares of Parklane's common stock held prior to the public offering was increased (based upon Parklane's shareholders' equity at June 29, 1968) from \$1.54 to \$3.39 per share.

FIFTEENTH: Deny each and every allegation contained in paragraph "10" of the amended complaint.

SIXTEENTH: Deny each and every allegation contained in paragraph "11" of the amended complaint, except admit that in or about 1971 Herbert N. Somekh and Denise D. Somekh borrowed approximately \$900,000 from a bank.

SEVENTEENTH: Deny each and every allegation contained in paragraphs "12", "13", "14" and "15" of the amended complaint.

EIGHTEENTH: Deny each and every allegation contained in paragraph "16" of the amended complaint, except admit that at or about the time New PLHC Corp. was or-

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

ganized it acquired 672,196 shares of common stock of Parklane, that said number of shares amounted to approximately 71.6% of the issued and outstanding stock of Parklane, that an equivalent number of shares of New PLHC Corp. was issued and was 100% of its outstanding stock.

NINETEENTH: Deny each and every allegation contained in paragraph "17" of the amended complaint, except admit that three of the defendants were elected to the Board of Directors of New PLHC Corp., that such defendants constituted the Board of Directors of New PLHC Corp., and that said persons were at the same time three of five directors of Parklane.

TWENTIETH: Deny each and every allegation contained in paragraph "18" of the amended complaint.

TWENTY-FIRST: Deny each and every allegation contained in paragraph "19" of the amended complaint, except admit that New PLHC Corp. merged with and into Parklane, that the issued and outstanding shares of Parklane issued to New PLHC Corp. were cancelled and that each share of New PLHC Corp. common stock which was outstanding prior to the merger became one share of Parklane.

TWENTY-SECOND: Deny each and every allegation contained in paragraphs "20", "21", "22", "23", "24", "25", "26", "27" and "28" of the amended complaint.

AS TO THE ALLEGED COUNT II

TWENTY-THIRD: With respect to paragraph "29" of the amended complaint, repeat and reallege each and every

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

allegation made in answer to paragraphs "1" through "6" and "8" through "27" of the amended complaint as though the same were here set forth at length.

TWENTY-FOURTH: Deny each and every allegation contained in paragraph "30" of the amended complaint, except admit that the proxy statement was distributed by use of the mails.

TWENTY-FIFTH: Deny each and every allegation contained in paragraph "31" of the amended complaint and in each subparagraph thereof.

TWENTY-SIXTH: Deny each and every allegation contained in paragraph "32" of the amended complaint.

AS TO THE ALLEGED COUNT III

TWENTY-SEVENTH: With respect to paragraph "33" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length.

TWENTY-EIGHTH: Deny each and every allegation contained in paragraph "34" of the amended complaint, except admit that the Parklane annual report on Form 10-K for the fiscal year ended September 28, 1974 was filed with the Securities and Exchange Commission on or about July 14, 1975.

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

TWENTY-NINTH: Deny each and every allegation contained in paragraph "35" of the amended complaint.

THIRTIETH: Deny each and every allegation contained in paragraph "36" of the amended complaint, except admit that the Parklane quarterly reports on Form 10-Q for the fiscal quarters ended December 28, 1974, March 28, 1975 and June 27, 1975 were filed with the Securities and Exchange Commission on or about October 22, 1975.

AS TO THE ALLEGED COUNT IV

THIRTY-FIRST: With respect to paragraph "37" of the amended complaint, repeat and reallege each and every allegation made in answer to paragraphs "1" through "6", "8" through "28" and "30" and "31" of the amended complaint as though the same were here set forth at length:

THIRTY-SECOND: Deny each and every allegation contained in paragraphs "38" and "39" of the amended complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

THIRTY-THIRD: The amended complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

THIRTY-FOURTH: The exclusive remedy for the payment of the fair value of the shares of any purported members

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

of the purported plaintiff class is governed by Section 623 of the New York Business Corporation Law.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

THIRTY-FIFTH: On or about January 17, 1975, plaintiff Leo M. Shore commenced an appraisal proceeding entitled *In the Matter of the Petition of Leo M. Shore, etc.*, Index No. 1041/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

THIRTY-SIXTH: On or about January 23, 1975, certain purported members of the purported plaintiff class commenced an appraisal proceeding entitled *Pappalardo, et al. v. Parklane Hosiery Company, Inc.*, Index No. 1268/1975, in the Supreme Court of the State of New York in and for the County of Nassau, which is presently pending before said Court and in respect of which pursuant to Court Order dated May 16, 1975, an appraiser was appointed and is acting.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

THIRTY-SEVENTH: The purported members of the purported plaintiff class are not entitled to rescission of the October 1974 merger of New PLHC Corp. into Parklane

*Answer to Amended Complaint of Certain Defendants
Including Herbert N. Somekh*

since they did not act promptly in asserting a demand for rescission.

WHEREFORE, defendants demand judgment dismissing the amended complaint as against them, together with the costs and disbursements of this action.

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

Plaintiff's Notice of Motion for Summary Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[TITLE OMITTED IN PRINTING]

S I R S :

PLEASE TAKE NOTICE, that upon the complaint and upon the annexed affidavit of Samuel K. Rosen sworn to November 24, 1976, copies of which are annexed hereto, plaintiff will move this Court at Room 1506, United States Courthouse, Foley Square, New York, New York on the 17th day of December 1976 at 2:30 P.M., or as soon thereafter as counsel can be heard, for an order granting summary judgment to plaintiff, pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon the ground that it appears from the complaint and the annexed affidavit that there is no genuine issue as to material facts and plaintiff is entitled to judgment as a matter of law, and for such other and further relief as the Court may deem just and proper.

Dated: New York, New York
November 24, 1976

Yours, etc.

KASS, GOODKIND, WECHSLER
& GERSTEIN

* * *

[PROOF OF SERVICE OMITTED IN PRINTING]

**Opinion of the District Court
Denying Summary Judgment**

PRINTED AS APPENDIX E, p. 26a TO
THE PETITION FOR CERTIORARI

**Order of the District Court Amending
Interlocutory Order**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

LEO M. SHORE,

Plaintiff,

against

PARKLANE HOSIERY, COMPANY, INC., *et al.*,

Defendants.

This matter having come on for hearing upon plaintiff's motion for an order amending this Court's order entered January 14, 1977, which denied plaintiff's motion for summary judgment, to include therein certain statements required by 28 U.S.C.A. § 1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure required for a petition for permission to appeal, and this Court, upon reading the papers submitted in support of this motion, all prior papers and proceedings herein, and having heard, on February 10, 1977, argument of counsel, it is

ORDERED, that the order denying plaintiff's motion for summary judgment, entered January 14, 1977, herein is hereby amended to include the following:

(1) This order involves a controlling question of law as to which there is substantial ground for difference of opinion, to wit:

Whether the Court's findings of fact in a prior action commenced by the Securities and Exchange

*Order of the District Court
Amending Interlocutory Order*

Commission ("SEC") can, by the doctrine of collateral estoppel, be applied to a subsequent action by a different plaintiff, seeking legal and equitable relief, based on the same transactions as was the action commenced by the SEC, when (a) there was no right to a jury trial in that action and (b) the Court found that the subject transaction was effected by means of materially misleading statements and omissions.

(2) An immediate appeal from this order may materially advance the ultimate termination of this litigation.

Dated: New York, New York
March 3, 1977

So Ordered 3/4/77
/s/ INZER B. WYATT
U.S.D.J.

**Order of the Court of Appeals Granting
Petition for Leave to Appeal**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of April, one thousand nine hundred and seventy-seven.

LEO M. SHORE,

Plaintiff-Appellant,

against

PARKLANE HOSIERY COMPANY, INC., *et al.*,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the petitioner for leave to appeal under 28 USC § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure be and it hereby is granted.

.....
J. EDWARD LUMBARD

.....
WALTER R. MANSFIELD

.....
MURRAY I. GURFEIN
Circuit Judges

58a

**Opinion of the Court of Appeals Reversing the
Denial of Summary Judgment**

PRINTED AS APPENDIX A, pp. 1a-19a TO THE
PETITION FOR CERTIORARI

59a

**Judgment of the Court of Appeals Reversing the
Denial of Summary Judgment**

PRINTED AS APPENDIX B, pp. 20a-21a
TO THE PETITION FOR CERTIORARI

60a

**Order of the Court of Appeals Denying
Petition for Rehearing**

PRINTED AS APPENDIX C, pp. 22a-23a
TO THE PETITION FOR CERTIORARI

61a

**Order of the Court of Appeals Denying
Petition for Rehearing In Banc**

PRINTED AS APPENDIX D, pp. 24a-25a
TO THE PETITION FOR CERTIORARI

**Order of the Supreme Court of the United States
Allowing Certiorari**

SUPREME COURT OF THE UNITED STATES

No. 77-1305

PARKLANE HOSIERY COMPANY, INC., *et al.*,

Petitioners

v.

LEO M. SHORE

ORDER ALLOWING CERTIORARI. Filed May 1, 1978.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.